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No. _____

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

~~72-483~~

FRANCIS R. SALAZAR,
Petitioner,

versus

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

FRANCIS R. SALAZAR,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

FRANCIS R. SALAZAR, Your Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above case on July 12, 1972, a Petition for Rehearing being denied on August 25, 1972.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit entered July 12, 1972 printed in the Appendix at pp. A-1, infra, is not yet officially reported. On August 11, 1972, following filing Petitioner's SUPPLEMENT TO PETITION FOR REHEARING, the Court revised pages 2 and 3 of its Opinion of July 12, 1972, substituting the phrase "insured bank" for the phrase "member bank" wherever

said phrase appeared on said two pages, with new pages 2 and 3 being superseded in the Appendix at pp. A-20-21, infra, there being no other revisions made in the Opinion which affirmed Petitioner's conviction of "conspiration" of bank moneys in violation of 18 U.S.C. §656 and conspiracy in violation of 18 U.S.C. §371. Petitioner was tried in the District Court by a jury and there is no opinion of that Court.

JURISDICTION

The judgment of the United States Court of Appeals was entered July 12, 1972. A petition for rehearing, as supplemented, was thereafter timely denied on August 25, 1972, the Order of Denial being printed at pp. A-21-23 of the Appendix, infra. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is 18 U.S.C. §656 unconstitutional insofar as concerns the offense of "conspiration" of bank moneys, funds and credits because of vagueness and uncertainty in violation of the Fifth and Sixth Amendments to the Constitution of the United States?

2. If the phrase "willfully misapplies" is not unconstitutionally vague, can any intent be imputed to Congress that an unlawful conspiration-theft is committed by officers and directors of a "state insured" bank who lend money to financially responsible and sophisticated borrowers (who acknowledge their liability for repayment of said loan), who then lend the proceeds of said loan to said officers and directors, who are not

[illegible]

3. [illegible]

4. [illegible]

5. [illegible]

6. [illegible]

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI

"In all criminal prosecutions the accused shall. . . be informed of the nature and cause of the accusation . . . ."

Amendment V

"No person shall. . . be deprived of life, liberty, or property, without due process of law . . . ."

STATUTES INVOLVED

18 U.S.C. Section 656 (Theft, Embezzlement, or Misapplication by Bank Officer or Employee) is set forth in the Appendix, p. A-23, infra.

18 U.S.C. Section 371 (Conspiracy) is set forth in the Appendix, p. A-27, infra.

18 U.S.C. Section 657 (Lending, Credit and Insurance Institutions) considered in conjunction with 18 U.S.C. Section 1006, is indirectly involved as illustrative that Congress did not intend the type of loans involved herein to amount to the offense of misapplication of bank moneys within the meaning of "willfully misapplies" as used in 18 U.S.C. Section 656. As pertinent, 18 U.S.C. Section 657 is set forth in the Appendix at pp. A-24, infra.

18 U.S.C. Section 1006 (Federal Credit Institution Entries, Reports and Transactions) indirectly involved and as pertinent, is set forth in the Appendix at pp. A-25, [1] infra.

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[1] Whereas 18 U.S.C. Section 1006 makes it a criminal offense for officers, agents, or employees of named corporations, institutions or

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 8(b), F. R. Crim. P. provides:
"Joinder of Defendants: Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Rule 6(e), F. R. Crim. P. provides:
"Disclosure of matters occurring before the grand jury. . . may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury . . ." (Emphasis supplied)

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associations to participate or share in or receive directly or indirectly ". . . any money, profit, property, or benefits through any. . . loan. . ." no comparable statute makes it a criminal offense as to those individuals to which 18 U.S.C. Section 656 applies.

Rule 6(d), F. R. Crim. P. provides that "a stenographer or operator of a recording device. . ." may be present at Grand Jury Proceedings.

STATEMENT OF THE CASE

The jurisdiction of the District Court was based upon a Federal Indictment charging violations of 18 U.S.C. Sections 656 and 371.

The undisputed evidence at trial was that Michael Cooper (no relation to Petitioner's co-defendants below) and Harvey Alpert were very successful residential subdivision developers in the Denver, Colorado metropolitan area.

They were building 150 to 200 homes per year (III Tr. 387).[2] They developed three subdivisions through some fifteen different corporations (III Tr. 388), building between 1100 and 1200 homes on which borrowed construction money averaged $25,000 per home, total construction money borrowed amounting to between $27,500,000 and $30,000,000 (III Tr. 388). On about February 17, 1966, the date of the loan transaction involved herein, Michael Cooper and Harvey Alpert on the basis of a financial statement showing a net worth of $796,000 (III Tr. 385-386) borrowed $65,000 from The Rocky Mountain Bank, Lakewood, Colorado, an "insured bank" within the meaning of 18 U.S.C. Section 656, and executed loan papers in connection therewith (III Tr. 358)

---

[2] References are to the volume and page of the trial transcript.

The reason for said loan was that the American National Bank of Denver had a real estate mortgage on Denver Revival Tabernacle which was owned by Delmar, Donald and Paul Cooper, who were brothers, who also were directors of The Rocky Mountain Bank, Delmar being the president of said bank. The Coopers were interested in selling the Denver Revival Tabernacle property because the American National Bank had called its mortgage. Michael Cooper and Harvey Alpert interested in a motel development in the area of the Denver Revival Tabernacle property, and whereas they were somewhat interested in purchasing the Denver Revival Tabernacle property, it was decided that due to the paucity of time, because American National Bank had called its mortgage, that Michael Cooper and Harvey Alpert would borrow sufficient moneys from The Rocky Mountain Bank to pay off the American National Bank mortgage (X Tr. 1765) and then an attempt would be made to negotiate a sale of the property to Alpert and Cooper. It was understood that if the sale was consummated, Petitioner herein, Francis R. Salazar, an attorney, who also was chairman of the board of The Rocky Mountain Bank, would receive $5,000 in attorney fees for handling the transaction.

Upon consummation of the $65,000 loan transaction to Alpert and Cooper, the proceeds were deposited in the trust account of Petitioner, Francis R. Salazar, and $55,000 was used to pay off the American National Bank's mortgage on the Denver Revival Tabernacle property; $5,000 was given to Donald Cooper to pay off outstanding liens (X Tr. 1765-1766);

and $5,000 was retained by Petitioner as attorney fees.

Negotiations did not materialize into a sale of the Denver Revival Tabernacle to Cooper and Alpert. Foreseeing this possibility, Cooper and Alpert at the time the $65,000 loan was made to them asked for and received a $65,000 promissory note from Delmar and Donald Cooper as their collateral for the intended use of the proceeds from said loan (III Tr. 358-359, 379-380, 381-382, 396-397).

When the sale to Alpert and Cooper of the Denver Revival Tabernacle property did not materialize, the entire $65,000 loan was repaid The Rocky Mountain Bank, plus a total of $4,161.66 interest (Exhibit 500).

The foregoing loan transaction was the basis for COUNT V of the "SUPERSEDING INDICTMENT" which read:

"The Grand Jury further charges:

"That on or about the 17th day of February, 1966, within the District of Colorado, the defendants DELMAR E. COOPER, DONALD S. COOPER, PAUL E. COOPER and FRANCIS R. SALAZAR, being officers and/or directors of The Rocky Mountain Bank, Lakewood, Colorado, a bank whose deposits were then insured by the Federal Deposit Insurance Corporation, with intent to injure and defraud said bank, did wilfully misapply the sum of $65,000.00, of the moneys, funds and credits of said bank in that they did cause to be made to their own benefit a loan of the $65,000.00 to Harvey Alpert and Michael Cooper and concealed the defendants' interests therein

from the bank, in violation of Title 18, United States Code, Section 656."

Count V being the only substantive Count as to which Petitioner was convicted, and although charged with a total of seven substantive counts, judgments of acquittal were granted as to Counts VII, VIII and IX, and the jury returned not guilty verdicts as to Counts III, IV and VI, of the Superseding Indictment. The SUPERSEDING INDICTMENT consisted of Count I, a conspiracy count, and twelve substantive counts, eleven of which purported to charge willful misapplication of bank moneys in violation of 18 U.S.C. §656, Count X being an embezzlement count. Various defendants were named in various counts and none of the defendants were named in all counts.

CHART I - CHART OF COUNTS CHARGED - DISMISSED, ETC. is set forth at p. A-28, infra. CHART II - CHART OF DATES OF ALLEGED OFFENSES is set forth at p. A-29, infra. COUNT I is set forth at pp. A- infra.

Although Rule 7(c), F. R. Crim. P. specifically provides that ". . . Allegations made in one count may be incorporated by reference in another count. . .", no allegation of any Count was incorporated by reference in any other Count of the Superseding Indictment. The Court of Appeals stated the Indictment ". . . charged various of the appellants of separate transactions, each constituting a misapplication or embezzlement (COUNT X) . . ." (underscore supplied).

As to Petitioner's pre-trial motion for severance pursuant to Rule 8(b) F. R. Crim. P., the Court of Appeals after previously noting

that the Indictment charged "separate transactions", stated:

> "There was sufficient evidence that the appellants were joint participants in the same act or transaction or series of acts or transactions to warrant their joint indictment. . . ." (Underscore supplied)

COUNT I charged Defendants (all of whom except Defendant Norman were members of the Board of Directors of The Rocky Mountain Bank) who constituted the majority of the Board of Directors with making certain loans without "disclosing" same to the "bank" (p. A-30) and each of the substantive counts charged to the effect that Defendants made certain loans and "concealed" their interest therein from the "bank", the term "bank" not otherwise being defined e.g. COUNT V p. 8 , supra. The jury was never instructed as to what constituted the "bank" or what constituted "disclosure to the bank". Petitioner tendered Instruction No. 19 based on C.R.S. 1963, 14-9-16 that "The affairs of a state bank shall be managed by a Board of Directors. . ." required any alleged concealment to be ". . . from a majority of the Board of Directors of The Rocky Mountain Bank." which instruction was refused, the Court giving in place thereof the instruction that misapplication could be committed:

> "first, by an officer or director of an insured bank causing a loan to be made for his own benefit and concealing his interest in the loan from the bank or, secondly, by an officer or director of the bank causing a loan to be made and knowingly concealing

> from the bank the identity of the true borrower.
> ". . . . . ."
> (XIV Tr. 2589; emphasis supplied).

No other instruction was given defining "bank". The Court of Appeals stated the instructions given, when considered as a whole adequately explain the applicable law (p. A-18, infra).

REASONS FOR GRANTING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IN FINDING THE TERM "MISAPPLY" [WILLFULLY MISAPPLIES] AS USED IN 18 U.S.C. SECTION 656 NOT ". . . SO VAGUE AS TO BE CONSTITUTIONALLY IMPERMISSIBLE", HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

18 U.S.C. Section 656 provides:

> "Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank. . . embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank. . . shall be fined not more than $5,000 or imprisoned not more than five years, or both. . ."
> (Emphasis supplied)[3]

This Court has never determined the constitutionality of the phrase "willfully misapplies"

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[3] This section is set out in full at p. A-23, infra.

under either the Fifth or Sixth Amendments to the Constitution of the United States. In the early landmark case of United States vs. Britton, 107 U.S. 655, 27 L. Ed. 520, 2 S. Ct. 512 (1882), the Court had under consideration Section 5209 of the Revised Statutes upon which 18 U.S.C. Section 656 is based. In Britton at 107 U.S. 669, the Court stated:

> "The words 'willfully misapplied' are, so far as we know, new in statutes creating offenses, and they are not used in describing any offense at common law. They have no settled technical meaning like the word 'embezzle' . . . They do not, therefore, of themselves fully and clearly set forth every element of the offense charged. It would not be sufficient simply to aver that the defendants 'willfully misapplied' the funds of the association. . . There must be averments to show how the application was made and that it was an unlawful one. . . ."

United States vs. Britton was before this Court on a Certificate of Division in opinion between the judges of the Circuit Court of the United States for the Eastern District of Missouri, a clear indication of a difference of judicial opinion as to the meaning of "willfully misapplies" as long ago as 1882.

Section 5209 of the Revised Statutes as to a willful misapplication required an intent ". . . to injure or defraud to association or any other company, body politic or corporate, or any individual person. . ." Based upon the statutory intent required, the Court was able to distinguish between acts of maladministration and acts of criminal misapplication holding the latter required a "conversion" of bank moneys.

United States vs. Northway, 120 U.S. 327, 334-335, 30 L.Ed. 664, 7 S.Ct. 580 (1887) clearly recognized that the word "misapply" was "ambiguous". See also Donegan vs. United States, 296 F. 843, 845 (5th Cir., 1924); Batchelor vs. United States, 156 U.S. 426, 428, 39 L.Ed. 478, 15 S.Ct. 446, and Jewett vs. United States, 100 Fed. 832, 840 (1st Cir., 1900).

18 U.S.C. Section 656, unlike Section 5209 of the Revised Statutes contains no requirement that whoever "willfully misapplies" bank moneys does so "with intent . . . to injure or defraud . . ." anyone whomsoever. The word "willfully" used in conjunction with "misapplies" in 18 U.S.C. Section 656 cannot readily be construed as a congressional intent that a criminal misapplication under Section 656 requires an intent to injure or defraud since Section 5209 of the Revised Statutes also contained the language "willfully misapplies" and in addition thereto language requiring an intent to injure or defraud. Thus, 18 U.S.C. Section 656 contains no language whereby acts of mere maladministration are distinguishable from a criminal misapplication. In Gorin vs. United States, 312 U.S. 19, 27, 85 L.Ed. 488, 494, 61 S.Ct. 429 (1941) the test as to constitutional uncertainty or vagueness was recognized as being whether a statute deprived a person of the ability to predetermine whether a contemplated action was criminal under the provisions of the statute involved. In United States vs. Reese, 92 U.S. 214, 221, 23 L.Ed. 563, this Court recognized:

> "It would certainly be dangerous if the legislature could set a net large enough to

catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large." (Emphasis supplied)

A statute in terms so vague, ambiguous and uncertain, that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the due process clause of the Fifth Amendment to the Constitution of the United States (United States vs. Ballard, 12 F. Supp. 321; United States vs. Reese, supra; Harrop vs. United States, 10 F. Supp. 753; Millar vs. Standard Nut Margarine Co., 284 U.S. 498, 76 L.Ed. 422, 56 S.Ct. 260). Where a statute is so vague that it leaves the standard of guilt to the "variant views of the different courts and juries which may be called on to enforce it", the statute cannot be squared with the Sixth Amendment (United States vs. Cohen Grocery Company, 216 Fed. 218, 220, aff'd. 255 U.S. 81, 65 L.Ed. 516, 41 S.Ct. 298) and the statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties (Lanzetta vs. New Jersey, 306 U.S. 451, 83 L.Ed. 888, 59 S.Ct. 618 (1939); Ex Parte Webb, 255 U.S. 663, 56 L.Ed. 1248, 32 S.Ct. 769 (1912)). In United States vs. Cardiff, 344 U.S. 174, 97 L.Ed. 200, 73 S.Ct. 189 (1952), this Court stated:

"'. . . Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula. . . ."

A conviction under a statute so vague as to make criminal an innocent act cannot be sustained (Winters vs. New York, 333 U.S. 507, 92 L.Ed. 840, 68 S.Ct. 665 (1948)). In Winters vs. New

York, supra, the statute there under consideration was held unconstitutionally vague as not an effective notice of a new crime, this Court stating:

". . . The clause has no technical or common law meaning. Nor can light as to the meaning be gained from the section as a whole or the Article of the Penal Law under which it appears. . . ." (Emphasis supplied)

And, from the Cohen Grocery Co. case, supra, the Court quoted the following:

"It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."

In the absence of any clearly defined congressional intent as to the scope and extent of "willfully misapplies", it is physically impossible for bank officers and employees to determine from a reading of 18 U.S.C. Section 656 what acts are prohibited (United States vs. Cardiff, supra) nor can they predetermine whether a contemplated action is criminal (Gorin vs. United States, supra).

Reliance by the Court of Appeals below upon United States vs. Archambault, 441 F. 2d 281 (10th Cir., 1971), cert. denied, ____ U.S. ____, for the proposition that the term "misapply" is not so vague as to be constitutionally impermissible, is misplaced. Archambault, supra, simply held the term "misapply" adequate to advise appellant of her alleged offenses in view of the total charge of ". . . embezzlement, abstraction, purloining or misapplication. . ." It was only the use of the

term "misapply" in conjunction with other statutory language that the indictment was upheld in United States vs. Archambault, supra. Had the indictment simply charged "willful misapplication" without further particularization and absent an allegation of conversion, the indictment would have been fatally defective under United States vs. Britton, supra, for lack of ". . . averments to show how the application was made and that it was an unlawful one. . . ." (107 U.S. 669) and because of a lack of an allegation of "conversion" (107 U.S. 666-667).[4]

Counsel is not unaware that cases under Section 656 have held that "an intent to defraud" remains an essential element of any crime under said Section (e.g. Ramirez vs. United States, 318 F. 2d 155 (9th Cir., 1963)). However, this would seem contra to the congressional intent and purpose in the omission of the statutory language requiring an intent ". . . to injure or defraud. . ." especially in view of the fact that the former statute also contains the language "willfully misapplies." Further, the omission from 18 U.S.C. Section 656 of statutory language of a required intent as concerns

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4 The indictment herein involved also contained no allegation of "conversion," e.g. COUNT V simply naming certain defendants as officers and/or directors of The Rocky Mountain Bank who allegedly willfully misapplied $65,000 ". . . in that they did cause to be made to their own benefit a loan of $65,000.00 to Harvey Alpert and Michael Cooper and concealed the defendants' interests therein from the bank. . ." (p. 8, supra).

"willfully misapplies" can hardly be squared with the reasoning of Bowman vs. United States, supra, and United States vs. Kampiles, 132 F. Supp. 3 (Ky., 1955) that the omission of language of an intent to injure and defraud from the 1948 revision was due to redundancy. See United States vs. Gaultney, 125 F. Supp. 413 (Va., 1954) holding an allegation of intent to defraud an essential element of the offense of willful misapplication. Further, the revision note to 18 U.S.C. Section 656 gives no indication that the statutory language, "an intent to injure or defraud," was omitted as redundant, which hardly could be the case in view of the holding in United States vs. Britton, supra, that the words "willfully misapplied" were new in statutes creating offenses and were not used in describing any offense at common law and have ". . . no settled technical meaning. . . ." Further, said revision note to 18 U.S.C. Section 656 contains the statement:

> ". . . It is believed that the revised sections adequately and correctly represent the intent of Congress as the same can be gathered from the overlapping and confusing enactments. . . ."

The statutory language requiring an intent to injure and defraud might be considered redundant in conjunction with the words "embezzles", "abstracts" and "purloins", but this does not hold true with "willfully misapplies" in view of this Court's holding in United States vs. Britton, supra. Further, where the purpose of a prior law is continued, the words are likewise continued, and the omission of the words implies an omission of the purpose Bardes vs. First National Bank (Bardes vs.

Hawarden Bank), 178 U.S. 524, 44 L.Ed. 1175, 20 S.Ct. 1000; Pirie vs. Chicago Title & T. Co., 182 U.S. 438, 45 L.Ed. 1171, 21 S.Ct. 906). See also Brewster vs. Gage, 280 U.S. 327, 74 L.Ed. 457, 50 S.Ct. 115; Shamrock Oil & Gas Corp. vs. Sheets, 313 U.S. 100, 85 L.Ed. 1214, 61 S.Ct. 868; Creek County vs. Seber, 318 U.S. 705, 87 L.Ed. 1094, 63 S.Ct. 920; Johnson vs. United States, 225 U.S. 405, 56 L.Ed. 1142, 32 S.Ct. 748; United States vs. Fisher, 2 Cranch. 358, 2 L.Ed. 304, and Crawford vs. Burke, 195 U.S. 176, 49 L.Ed. 147, 25 S.Ct. 9.

The omission from 18 U.S.C. Section 656 of language requiring an intent to injure and defraud has so broadened the concept of "willfully misapplies" as to render said phrase constitutionally vague and uncertain, overreaching in breadth and encompassing acts innocent in nature as well as acts recognized as mere negligence amounting to simple maladministration under United States vs. Britton, supra, and making same felonious criminal offenses.

II.

IN HOLDING THE LOAN TRANSACTION INVOLVED IN COUNT V OF THE SUPERSEDING INDICTMENT, A CRIMINAL "WILLFUL MISAPPLICATION" UNDER 18 U.S.C. SECTION 656, THE COURT OF APPEALS FOR THE TENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW OF FIRST IMPRESSION WHICH HAS NOT BEEN, BUT SHOULD BE, DETERMINED BY THIS COURT.

As to COUNT V of the Superseding Indictment, the Court of Appeals below has determined that a criminal misapplication of bank

moneys takes place within the meaning "willfully misapplies" as used in 18 U.S.C. Section 656 where a loan is made by a state insured bank to individuals: (1) who are real persons, (2) who are financially responsible for the amount of the loan, (3) who are sophisticated borrowers, (4) who acknowledged making the loan in question, and (5) who repeatedly acknowledged liability for repayment of said loan, when said borrowers lend the proceeds of said loan transaction to officers or directors of the bank making said loan to said individuals, even though said officers and directors are not prohibited by law from participating either directly or indirectly in such a loan transaction and said loan is fully repaid with interest at the going rate.

The effect of the affirmance of Petitioner's conviction of COUNT V is to place an undue restriction on the use of the proceeds of legitimate loans by borrowers and impose criminal sanctions on bank officers and directors of state insured banks who participate indirectly in said loan proceeds, who are not otherwise prohibited by law from so participating. The theory of the Government was expressed in final argument at trial by the Government prosecutor as follows:

> ". . . I am sure also that the Court will instruct you that it is <u>not</u> a violation of the <u>federal law</u> for an officer or director to make a loan from the bank in which he is an officer or director, that it is likewise not a violation of <u>federal law</u> for an officer or director to make a loan in his own interest, <u>but it is a violation of the law if the officer and director makes a loan in</u>

his own interest and conceals his interest from the bank. . . the crux of this case is whether or not there was concealment of the interests of the defendants charged. . ." (XIV Tr. 2442; Emphasis supplied)[5]

The trial court was of the clear opinion that an intent to injure and defraud the bank was not an essential element of the offense (XIII Tr. 2381-2382) and that a ". . . misapplication may be committed by causing a loan to be made for his (an officer or director) own benefit and concealing that interest from the bank." (XIII Tr. 2382).[6] Neither the COUNT V loan transaction (nor any other count of the Indictment for that matter) involved "fictitious" persons as borrowers, "fictitious loans" or loans made on either "fictitious" or "inadequate" security. On the contrary, as to the $65,000 COUNT V loan transaction, the Court repeatedly recognized the financial soundness of same, stating:

"Alpert was solvent. I remember that. So, let's go on, and he was on the note and he was solvent. That was a good note financially." (IX Tr. 1556, lines 1-3; emphasis supplied)

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[5] The term "bank" was never defined for the jury, despite the Government's theory that concealment from the bank was ". . . the crux of this case . . ." (XIV Tr. 2442, XV Tr. 2501, lines 17-18; 2505, lines 10-12; 2536; lines 2-4).

[6] The trial court finally did instruct that an intent to injure or defraud the bank was required (XIV Tr. 2589-2590).

"Yes, Alpert's note was good . . ." (IX Tr. 1637; emphasis supplied)

After the Government rested during argument for judgments of acquittal, the Court acknowledged as to all loans involved in all Counts of the Indictment that:

"Well, all of the loans were reported, there is no question about that." (IX Tr. 1538)

and further agreed with defense counsel that:

1. There was no evidence of any loans that "Were without proper security". (XIII Tr. 2382, lines 21-24).
2. There was no question "as to the adequacy of security". (XIII Tr. 2382, line 25 and XIII Tr. 2383, Line 2).
3. There was no evidence of causing a loan to be made to a "fictitious borrower". (XIII Tr. 2383, lines 2-7).

As to "misapplication", the trial judge stated as to the facts involved:

". . . Maybe this isn't even a crime. . ." (XII Tr. 2349).

The conspiracy count alleged two objects of the alleged conspiracy, to-wit:

"a. It was part of said conspiracy for the defendants to knowingly and wilfully cause, allow and permit The Rocky Mountain Bank to lend money to individuals, without disclosing to said bank that said loans involved no bona fide transactions of said borrowers but were made for the use and benefit of the defendants.

"b. It was a further part of said conspiracy for the defendants to knowingly and wilfully cause, allow and permit The Rocky Mountain Bank to lend money to corporations

in which the defendants had an interest, without disclosing to said bank the interests of the defendants in said loans and corporations."

The trial court's statements above as concerns object a. clearly indicated that the loan transactions in question and the COUNT V loan transaction in particular were, in fact, bona fide transactions. As to object b., the Colorado State Bank Commissioner, a defense witness, who was never cross-examined by the prosecution, made it clear that loans to corporations in which bank officers and directors had an interest were not illegal if done properly and there was no evidence of any such loans being done improperly.

More important is the fact that as to bank officers or directors of a state chartered "insured bank", there is no law which prohibits their participation indirectly in loans made to other borrowers i.e. the scope of "willfully misapplies" does not include COUNT V type of loan transactions. 18 U.S.C. Section 657 quoted infra, A-24, (a statute analogous to 18 U.S.C. Section 656) pertaining to officers, agents and employees of named corporations and institutions makes it a felony as to whoever named ". . . abstracts, purloins or willfully misapplies any moneys. . . belonging to such institution. . ." (Emphasis supplied.) As to the named officers, agents or employees named in 18 U.S.C. Section 657, with the exception of "whoever, being a receiver of any such institution, or agent or employee of the receiver. . .", 18 U.S.C. Section 1006 makes it a felony for such individuals who:

". . . participates or shares in or receives directly or indirectly any money, profit,

property, or benefits through any transaction, loan, commission, contract or any other act of any such corporation, institution, or association. . ." (Emphasis supplied)

There is no comparable statute which makes it a criminal offense for officers, directors, agents or employees of a state chartered "insured bank" covered by 18 U.S.C. Section 656 to participate either directly or indirectly in any "loan" made by their bank. On the other hand, executive officers of a "member bank" as defined by 18 U.S.C. Section 656 are severely restricted as to the making of loans from their bank by 12 U.S.C. Section 375a. If indirect participation in loan proceeds by officers or directors of a state chartered "insured bank" had been intended to be a criminal offense, then Congress could have enacted appropriate legislation as it did in connection with officers, agents and employees covered by 18 U.S.C. Section 1006, since participation directly or indirectly in loan proceeds by those named individuals obviously does not fall within the scope of "willfully misapplies" as used in 18 U.S.C. Section 657.

In its original opinion, the Court of Appeals below incorrectly and contrary to all the evidence, at pages 2 and 3 of said opinion incorrectly referred to the bank involved herein as a "member bank" and when Petitioner brought this error to the Court's attention, the Court merely revised pages 2 and 3 substituting "insured bank" for "member bank" (See pp. A-20-21, infra) without either comment or recognition of the substantive distinction of the lack of a statute comparable to 18 U.S.C.

Section 1006 with relation to 18 U.S.C. Section 656 and lack of comparable legislation restricting executive officers of state chartered "insured" banks similar to the restrictions imposed on executive officers of "member banks" by 12 U.S.C. Section 375a.

On the date of oral argument herein before the United States Court of Appeals for the Tenth Circuit, Judgments of Acquittal were argued before a Colorado District Judge other than the trial judge herein in United States vs. Karsten, Criminal Action No. 71-CR-317 involving "misapplication" of bank funds of a "national bank" in violation of 18 U.S.C. Section 656, the analogous factual situation otherwise being indistinguishable from the type of loan transaction involved in COUNT V herein. The prosecutor herein also prosecuted the Karsten case, supra, and, in arguing against Judgments of Acquittal in Karsten, he stated:

"Your Honor, there are no reported cases which deal directly with the facts of this case. However, an analogous case was tried in the United States District Court for the District of Colorado a few months ago in which we had some very, very similar actions on the parts of the individuals and that is United States vs. Cooper, et al., which was argued in the Tenth Circuit Monday and which opinion should be forthcoming, but in this case we had officers and directors of banks and loans to individuals and to corporations in which they had an interest without disclosing their interest in the loan and in the corporations to the bank."

The Government's position was that Karsten, supra, was a much stronger case, the prosecutor further stating:

> ". . .[W]e have an additional element in this case that was not present in the Rocky Mountain case, or in the case of United States vs. Cooper, et al.
>
> "In the Cooper case, we had a state bank in which the officers and in that case there was asserted no prohibition against the officers borrowing against the bank. In fact, some of the officers borrowed money from the bank and they were entitled to borrow money from the bank when they borrowed money in their own names. . . .
>
> "The fact that an officer of a national bank cannot borrow money generally from that bank and conversely the fact that the bank itself may not loan money to an executive officer of bank is very, very important here." (Emphasis supplied)[7]

Despite the prosecution's argument, Judgments of Acquittal were granted in Karsten. It seems anomalous that Petitioner herein stands convicted under an analogous indistinguishable factual situation from that involved in Karsten, who was granted Judgments of Acquittal, simply because his case was tried before a different District Judge within the same judicial district and in affirming Petitioner's

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[7] The quotations from Karsten herein quoted are found in the Karsten case transcript attached to the MOTION TO SUBMIT ADDITIONAL AUTHORITY, which was granted by the Tenth Circuit and before that Court, which makes no mention of said case in its opinion herein.

conviction, the Court of Appeals neither comments on nor disapproves the ruling in Karsten.

Further, the affirmance of Petitioner's conviction conflicts, in principle at least, with United States vs. Britton, 108 U.S. 193, 27 L. Ed. 701, 2 S. Ct. 526 (1883) where a bank president and director ". . . being insolvent, procured to be discounted his own note, the same not being well secured, the payee and endorser thereof being also insolvent. . ." and it was held this was not a criminal "misapplication".

Ignoring the factual setting in which the Court made the statement, the Court of Appeals below relied upon the language of United States vs. Fortunato, 402 F.2d 79, at 81 (2nd Cir., 1968) cert. denied 394 U.S. 933, that the offense of "misapplication occurs when an officer of a bank knowingly lends money to a fictitious borrower or causes the loan to be made to his own benefit, concealing his interest from the bank." Fortunato, supra, involved "fictitious borrowers" and as to the only loan involving a "real person", Fortunato ". . . without the knowledge or authority of the applicant. . ." raised a loan application from $100 to $3,500 and pocketed the $3,400 difference. Here, the COUNT V loan was a good, sound, financially secure loan to real persons who were sophisticated borrowers, who acknowledged their liability for payment of same, the very nature of the loan transaction being such that it was inherently impossible for an intent to defraud and injure the bank to exist regardless of any alleged "concealment". In any event "concealment" was an impossibility as the defendant officers and directors constituted the majority of the Board

of Directors. Cf Laws vs. United States, 66 F. 2d 870, 873 (10th Cir., 1933).

The Government's theory that "concealment" was the crux of the case would have been a more appropriate argument for prosecution under 18 U.S.C. Section 1005 prohibiting false entries in bank books and records ". . . with intent to injure or defraud such bank. . . or to deceive any officer of such bank. . . or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank. . .", since the alleged "concealment" was based on the proposition that the COUNT V loan transaction so far as the bank's records were concerned failed to disclose said money was to be reloaned to Defendants named in COUNT V. However, this was not the offense charged.

The importance of the question as to whether loan transactions of the type involved in COUNT V is emphasized when it is realized that financially responsible borrowers who lend loan proceeds received by them to officers and directors of state chartered "insured banks" could be prosecuted as aiders and abettors, since if such loan transactions amount to criminal misapplications insofar as concerns said bank officers and directors, then the borrowers by borrowing the money in the first instance have aided and abetted such misapplication. Further, according to the Federal Deposit Insurance Corporation's 1970 Annual Report (the latest available) in 1970 there were a total of 35,321 commercial banks and non-deposit trust companies, in the United States, including 17,191 national, and 4,798 state banks which were members of the Federal Reserve system,

and 13,332 national and state banks which were not members of the Federal Reserve system. As to this latter group of 13,332 banks, the officers, directors, agents and employees thereof would subject themselves to criminal prosecution for misapplication of bank moneys under 18 U.S.C. Section 656 in situations where they made good, sound loans which were well secured to financially responsible individuals acknowledging their liability for payment of said loans if said individuals loaned any of the proceeds of such a loan to any such bank officer, director, agent or employee making same, regardless of whether the portion of proceeds reloaned to such individuals were repaid indirectly to the bank through the original borrowers or directly to the bank by such individuals, and regardless of the fact that the bank was paid interest at the going rate on the money loaned. No bank officer or director could loan any money to any corporation in which he had any interest without fully disclosing his stockholdings in such corporation, even if the loan was being made e.g. to General Motors, IT&T, Ford Motors or some other giant conglomerate in the hundreds of millions of dollars and the bank officer making same owned a minimal number of shares, since as a stockholder, he would ultimately benefit from such a loan.[8]

Undoubtedly, bankers throughout the United States connected with state chartered insured banks are unknowingly committing criminal misapplication of bank moneys every day, if the

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[8] This situation falls squarely within the alleged object b. (quoted at p. 21, supra) of the conspiracy count.

reasoning of the Court of Appeals below is upheld as being the law.

III.

IN SANCTIONING THE TRIAL COURT'S FAILURE TO GIVE PETITIONER'S TENDERED INSTRUCTION NO. 19 OR ANY OTHER INSTRUCTION DEFINING THE TERM "BANK", THE COURT OF APPEALS BELOW HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

On the basis of the Government's theory that ". . . the crux of this case is whether or not there was concealment of the interests of the defendants charged. . ." in various loans from the "bank", Petitioner tendered Instruction No. 19 whereby he sought to have the Court instruct the jury that the alleged concealment must have been ". . . from a majority of the Board of Directors of The Rocky Mountain Bank", which the Court refused. Instruction No. 19 was based upon United States vs. Matsinger, 191 F. 2d 1014, 1017 (3rd Cir., 1951); United States vs. Wiggenhorn, 312 F. 2d 289 (9th Cir., 1963); United States vs. Martindale, 146 Fed. 289 (D. C. Kans., 1904); Donegan vs. United States, 296 Fed. 843 (5th Cir., 1924); Mulloney vs. United States, 79 F. 2d 566, 572 (1st Cir., 1935); United States vs. Cawthon, 125 F. Supp. 419, 421, 422 (D. C. Ga., 1954); and Batchelor vs. United States, 156 U.S. 426, 39 L. Ed. 478, 15 S. Ct. 446 (1894). The term "bank" is as generic as was the term "association" in United States vs. Martindale, supra. Yet, the Superseding Indictment herein never descended to

particulars to advise from whom Defendants allegedly "concealed", and by reason thereof, it was vague and indefinite in violation of Defendant's Sixth Amendment rights. Further, no instruction whatsoever was given to the jury defining the term "bank". C.R.S. 1963, 14-9-16 provides:

> "The affairs of a state bank shall be managed by a Board of Directors. . ."

However, the jury was never so instructed and could only speculate as to from whom the various loan transactions allegedly were "concealed". From all that appears the jury may have speculated that the nature of each loan transaction had to be disclosed to each shareholder despite the fact the evidence disclosed the Board of Directors and Loan and Discount Committee were well aware of the nature of the COUNT V loan transaction. Further, what Michael Cooper and Harvey Alpert intended to do with the loan proceeds was of no moment to the bank so long as their loan was financially sound. The Court of Appeals below disposed of Petitioner's contention that the trial court erred by failing to define the term "bank" with the simple statement that ". . . the instructions given when considered as a whole adequately explain the applicable law." But the fact remains that the term "bank" was never defined.

Due administration of criminal justice under the foregoing circumstances most certainly called for the jury to be told from whom Defendants allegedly "concealed" their interests, as alleged concealment from the "bank" without any further definition as to what constituted the "bank" told the jury nothing and Petitioner's conviction is based on mere speculation by the jury as to what constituted the "bank".

IV.

IN HOLDING THERE WAS NO MISJOINDER OF DEFENDANTS OR ERROR BY THE TRIAL COURT IN REFUSING TO SEVER PURSUANT TO MOTION UNDER RULE 8(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE ON THE BASIS THERE WAS SUFFICIENT "EVIDENCE" THAT THE APPELLANTS WERE JOINT PARTICIPANTS IN THE SAME ACT OR TRANSACTION OR SERIES OF ACTS OR TRANSACTIONS, THE COURT OF APPEALS BELOW HAS RENDERED A DECISION IN DIRECT CONFLICT WITH SAID RULE 8(b), WHICH DECISION ALSO CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL.

Rule 8(b) F. R. Crim. P. quoted at p. 5, supra, provides for joinder of defendants in the same indictment ". . . if they are alleged. . ." to have participated in the same act or transaction or the same series of acts or transactions constituting an offense or offenses. The Superseding Indictment herein does not contain the required "allegations" of joint participation. No allegation of any count of the Indictment is incorporated by reference into any other count as was permissible under 7(c), F. R. Crim. P. Consequently, each count of the Indictment must be considered as a separate and distinct indictment, complete in itself (42 C.J.S., Indictments and Information, Section 153, p. 1083). The Court of Appeals below in its opinion recognized that various of the appellants were charged with ". . . <u>separate transactions</u>, each constituting a misapplication. . ." (See p. A-2, infra; emphasis supplied). The propriety of joinder and right to severance under Rule 8(b) is, as is specifically provided by said Rule 8(b) to be determined from the "allegations" of the

Indictment (See Williams vs. United States, 410 F. 2d 1064, 1068 (8th Cir., 1969); Chubet vs. United States, 414 F. 2d 1018, 1019-1020 (8th Cir., 1969); and Ingram vs. United States, 272 F. 2d 567 (4th Cir., 1959)). See Charts I and II, pp. A-28-29, infra, Chart I showing that the only Count in which all Defendants were charged was COUNT I, the conspiracy Count, but none of the allegations of COUNT I were incorporated by reference into any other Count and not all Defendants were charged in any other Count e.g. Petitioner not charged in COUNTS II, X, XII and XIII. Chart II, p. A-29, infra, shows the alleged offenses occurred on widely separated dates.

In Chubet vs. United States, supra, the Court quoted from Ingram vs. United States, supra, that:

> "[W]here multiple defendants are charged with offenses in no way connected, and are tried together, they are prejudiced by that very fact, and the trial judge has no discretion to deny relief."

Here, despite the lack of any allegation of concert of action by Defendants tying the substantive counts together and despite no allegation in the conspiracy count that the conspiracy was to commit the substantive Counts, the Court of Appeals below held joinder was not improper and the trial court's refusal to sever on motion was not error because there was "sufficient evidence" of joint participation. This applies a "hindsight" test contrary to the express language of Rule 8(b) to the effect that allegations contained in the Indictment are controlling as to the propriety of joinder. Further, if "sufficiency of the evidence" were the proper test, then no

defendant would ever be entitled to a severance under said Rule 8(b) in advance of trial. In Chubet vs. United States, supra, where it stated:

> ". . . While Kauffman and the defendant were common participants in Counts III and V, there was no allegation linking the defendant with Counts I, VII, IX and XI. The information neither alleged that the transactions were connected nor that they were common to a conspiracy." (Emphasis supplied)

The Court of Appeals below in relying upon Miller vs. United States, 410 F. 2d 1290 (8th Cir., 1969), cert. denied, 396 U.S. 830, noting that a conspiracy count may properly be joined with substantive counts, the Court quoted but ignored the statement in Miller vs. United States, supra, that this was so: ". . . where it is alleged. . ." that the offenses are of the same or similar character and are based upon two or more acts or transactions "connected together or constituting parts of a common scheme or plan." In holding joinder was not improper and refusal to sever not error, the Court of Appeals below also ruled contrary to its own decision in United States vs. Eagleston, 417 F. 2d 11, 14, (10th Cir., 1969), where the Court recognized there was a misjoinder as to Faubian because he participated only in two counts of a three-count indictment, the Court further recognizing that under said 8(b) where there was a misjoinder of defendants ". . . there is no room for judicial discretion and the court must grant severance. . ."

Research has disclosed no case in which it has been held that the propriety of joinder of

defendants and right to severance under Rule 8(b) can be determined by the "hindsight" test based upon the "sufficiency of the evidence" and by so holding in the instant case, the Court of Appeals below has ruled upon an important question involving the due administration of criminal justice which is expressly contrary to the provisions of Rule 8(b) of F. R. Crim. P. and expressly contrary to the ruling in Williams vs. United States, supra, and also contrary to this Court's decision in Shaffer vs. United States, 362 U.S. 511, 4 L.Ed. 2d 921, 80 S.Ct. 945 (1960), which upheld joinder of a four-count indictment on the basis that the fourth count ". . . charged all of these parties with a conspiracy to commit the substantive offenses charged in the first three counts. . .", no similar allegation being contained in the conspiracy count involved herein.

V.

IN DETERMINING IN EFFECT THAT A GRAND JURY RETURNING A FATALLY DEFECTIVE INDICTMENT NEED NOT HEAR WITNESSES AS TO MATTERS ALLEGED IN A SUPERSEDING INDICTMENT PURPORTING TO CORRECT THE DEFECTS IN THE ORIGINAL INDICTMENT, THE COURT OF APPEALS BELOW HAS DETERMINED AN IMPORTANT FEDERAL QUESTION INVOLVING THE DUE ADMINISTRATION OF CRIMINAL JUSTICE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The original Indictment herein was fatally defective under United States vs. Britton, 107 U.S. 655, supra, and United States vs. Northway, supra, because each Count of the

Indictment simply alleged that the Defendants named therein did "willfully misapply" a specified amount of money without descending to particulars ". . . to show how the application was made and that it was an unlawful one. . . ." On a motion to dismiss the Indictment for this reason, the United States Attorney simply prepared a new Indictment which alleged as to Defendants named in each Count that the method of the alleged willful misapplication was by making loans to certain named individuals or corporations and concealing the Defendants' interests therein from the bank, which Superseding Indictment was returned as a true bill. Petitioner filed a motion to inspect grand jury minutes as to the procedure followed in the return of the Superseding Indictment alleging, among other things, that the grand jury's foreman's signature was obtained thereto without the submission of any additional evidence to the grand jury and that a question existed as to whether or not the Superseding Indictment was considered by the entire grand jury or merely signed by the foreman of the grand jury upon request by the Assistant United States Attorney contrary to the historic concept of the grand jury as contemplated by the Fifth Amendment to the Constitution of the United States and the principles laid down in Gaither vs. United States, 413 F. 2d 1061 (C.A.D.C., 1969).[9] In essence,

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[9] The motion to inspect grand jury minutes is fully set forth at Volume I, pp 115-119 of the Appendix prepared and filed in the Court of Appeals below, which raised additional questions of error, which Petitioner would respectfully reserve with permission of the court.

Petitioner sought to determine whether or not any evidence whatsoever had been presented to the grand jury respecting how the alleged misapplication took place and that it was an unlawful one, since the original Indictment simply alleged certain moneys to have been "willfully misapplied". It developed no minutes had been kept by the grand jury. The Court of Appeals below held the Superseding Indictment was not fatally defective as a denial of due process guarantees on the basis that it was not necessary that a grand jury once having heard witnesses recall witnesses to ". . . give in the form of repetition the evidence previously given before the same grand jury. . . ." This was an unwarranted assumption as there was no indication that witnesses called in connection with the return of the original Indictment gave any testimony as to the method of the alleged criminal misapplication or any evidence of a showing that the alleged misapplication was unlawful. Thus, by the simple expedient of not having recorded the grand jury proceedings, the defense was prohibited from showing that matters occurred before the grand jury, which would support a motion to dismiss the Indictment. Although Rule 6, F. R. Crim. P., is silent as to whether grand jury minutes are required to be recorded, the District Court in the United States vs. Gramolini, 301 F. Supp. 39 (R.I., 1969) held that the "better" practice of minute keeping would henceforth be a required practice. Melton vs. United States, ____ F. 2d ____, (10th Cir., 1968) held that the Government could not shield recorded testimony from a defendant by failing to transcribe it, and in reliance on Dennis vs. United States, 384 U.S. 855, 873, 16 L.Ed. 2d

973, 86 S. Ct. 1840, noted ". . . [I]t is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. . . ." Yet, this is precisely what occurs where no grand jury minutes are kept. Further, Rule 6(e), F. R. Crim. P., permits disclosure of matters occurring before the grand jury ". . . at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. . ." Petitioner maintains that a showing was made in his motion to inspect grand jury minutes herein, and the Government by having failed to maintain grand jury minutes, and not Petitioner, should have suffered the penalty of dismissal of the Superseding Indictment.

The defendant's right under Rule 6(e), F. R. Crim P., to inspect grand jury minutes upon a showing that grounds may exist for a motion to dismiss the Indictment is completely and totally eroded if Government prosecutors are allowed to refrain from recording grand jury proceedings.

The question as to whether Federal grand jury minutes are required to be recorded so as to effectuate the right of a defendant under Rule 6(e), F. R. Crim. P., is an important question in regards to the due administration of criminal justice, and a question which this Court should determine.

VI.

IN FAILING TO FIND SUBSTANTIAL PREJUDICE INHERENT IN APPELLANT'S CONVICTION OF A SINGLE CONSPIRACY ON THE BASIS OF EVIDENCE DISCLOSING A NUMBER

OF SEPARATE AND DISTINCT LOAN TRANSACTIONS, THE COURT OF APPEALS FOR THE TENTH CIRCUIT HAS RENDERED A DECISION IN DIRECT CONFLICT WITH KOTTEAKOS VS. UNITED STATES, 328 U.S. 750, 90 L.ED. 1557, 68 S.CT. 609 (1946).

The Superseding Indictment charged a single, general conspiracy to willfully misapply approximately $700,000 of bank moneys and funds by (1) making loans to individuals without disclosing to the bank that the loans were made for the use and benefit of the Defendants, and (2) loaning money to corporations in which Defendants had an interest without disclosing to said bank the interests of the Defendants in said loans and corporations. The evidence disclosed a number of separate and distinct loan transactions, each of which involved some, but not all, of the Defendants. The opinion of the Court of Appeals clearly notes that the Indictment charged "separate transactions" of alleged misapplication.

The trial court recognized that a defendant cannot be held responsible for anything in connection with a particular loan ". . . unless he had some connection with it. . ." (IV Tr. 650). The Government's case was broken down into separate and distinct loan transactions, as was evidenced by the testimony of the so-called summary witness, Glover (VIII Tr. 1423, et. seq.). The Superseding Indictment as shown by Chart I at p. A-28, infra, charged some Defendants in regards to certain loan transactions and other Defendants with other loan transactions. The conspiracy count contained no allegation tying the conspiracy in with any of the substantive counts, there being no allegation that the conspiracy was to commit the

substantive counts. The Petitioner was not charged with a single overt act in the conspiracy count.

As to COUNT V, which involved the Denver Revival Tabernacle, the trial court clearly stated:

> "Well, I don't think the evidence in relation to Denver Revival Tabernacle supports a conspiracy to any degree. . . ." (IX TR. 1628).

The opinion of the Court of Appeals herein in discussing the evidence as to COUNTS V, VIII and IX, clearly recognized the separate nature of each of these transactions and never even mentioned Petitioner in connection with COUNTS VIII or IX, and rightfully so, since there was no evidence tying Petitioner into said Counts.

In Kotteakos vs. United States, supra, the Indictment charged a single, general conspiracy and petitioners were convicted upon evidence which proved not one, but at least eight conspiracies of the same sort. In holding the variance between the Indictment and proof constituted substantial prejudice requiring reversal, the Court stated as follows:

> ". . .[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.

If so, or if one is left in grave doubt, the conviction cannot stand." (328 U.S. 765, 90 L. Ed. 1566)

Further, as to the Government's theory that the variance was insubstantial ". . . if the evidence offered specifically and properly to convict each defendant would be sufficient to sustain his conviction, if submitted in a separate trial. . .", the Court noted that ". . . this is not and cannot be the test. . ." The Court further rejected the Government's argument that no prejudice was shown because the jury had acquitted some, disagreed as to others, and found still others guilty, the Court noting that one difficulty was that ". . . the trial court itself was confused in the charge which it gave to guide the jury in deliberation. . ." Although, in the instant case, the Court did not tell the jury it could not "divide up" the conspiracy, he did instruct as to conspiracy (XIV Tr. 2583-2588) that one of the four essential elements required to be proved was ". . . that the conspiracy described in the indictment was willfully formed. . ." (XIV Tr. 2587) and throughout his instructions by making reference to "the" conspiracy, clearly indicated that the jury had but one conspiracy to consider.[10]

Here, as in Kotteakos, supra, the trial Court's view confused ". . . the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character. . ." (328 U.S. 769, 90 L. Ed 1569), since as to the 8 Counts the trial Court

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10 See Kotteakos vs. United States, 328 U.S. 767, 90 L. Ed. 1568.

sent to the jury, Petitioner was not involved in COUNTS VII, VIII, or IX, his Co-Defendants DEL and DON COOPER being convicted as to COUNTS VIII and IX (CHART I, infra).

Further, Petitioner was not charged with any Overt Act, but the trial Court instructed that it was necessary that the Government proved that one of the conspirators committed at least one of the Overt Acts charged in the INDICTMENT (XIV Tr. 2587).

Further, the Court instructed as to an Overt Act that it must be ". . . . in furtherance of some object or purpose of the conspiracy charged in the indictment" (XIV Tr. 2587), A similar situation existed in Kotteakos, supra, where the trial Court had instructed it was not necessary as a matter of law, that an Overt Act be charged against each Defendant, and as to this Instruction the Court stated:

> ". . .[I]t was competent not only for the jury to find that all of the defendants were parties to a single common plan, design and scheme, where none was shown by the proof, but also for them to impute to each defendant the acts and statements of the others without reference to whether they related to one of the schemes proven or another, and to find an overt act affecting all in conduct which admittedly could only have affected some. . . ."

Here, is is impossible to tell as to what Overt Act the jury relied upon and despite finding Petitioner guilty of only one substantive Count, might well have relied upon proof of an Overt

Act pertaining to a transaction in which he was not involved.[11]

In Kotteakos vs. United States, at 328 U.S. 774, 90 L.Ed. 1571, the Court further stated:

". . . the dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place. . ."

Further, Kotteakos, supra, recognized that the problem was not merely one of variance between the indictment and proof ". . . but is also essentially one of proper joinder. . ." See also United States vs. Varelli, 407 F. 2d 735 (7th Cir., 1969) which discusses Kotteakos, supra, in considerable detail.

In United States vs. Goss, 329 F. 2d 180 (4th Cir., 1964) at 183, the Court noted that an

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11 Further, the Court never instructed the jury it was necessary that the alleged conspiracy be to commit an offense against the United States. In this request it should be noted the Court of Appeals below stated the Indictment "charged all the appellants with conspiracy to defraud the United States" (Emphasis supplied), a totally erroneous statement (See COUNT I, quoted p. A-30, infra) but which is indicative of how casually the Court treated the appeal below, especially when considered with the fact the Court confused a "member bank" with an "insured bank" and contrary to Exhibit 500 (liability ledger) and all the evidence stated in its Opinion (p. A-5, infra) as to repayment of the $65,000 loan, the first payment was $5,000 which was charged to payment of interest.

indispensable ingredient of a [single] conspiracy was ". . . that the accused persons must have a common aim. . ." and that:

> ". . . If there were conspiracies here, the object of all the offenders save Aubrey, was not the same, for the object of one group was not always the object of another. The only thing in common was the law they were breaking. Consequently, the single conspiracy of the indictment falls apart when the conduct of the defendants is seen to consist of several instead of a sole combination."

Also, United States vs. Goss, supra, recognized that the variance also proved that joinder was improper under Rule 8(b), F. R. Crim. P., and Ingram vs. United States, supra. Here, the INDICTMENT clearly disclosed misjoinder under Rule 8(b), upon its face, as was brought to the Court's attention. But in any event, when the evidence disclosed the variance between the INDICTMENT and the evidence, the Court should have, under Rule 14, F. R. Crim. P., granted a severance or other relief from prejudicial joinder.

At the close of all the evidence, the Court recognized the existence of the Kotteakos, supra, problem, stating:

> "We have that problem with all the defendants who are still in the conspiracy case. I am not too happy about the conspiracy charge and I guess we are never too old to learn, but I think I have learned something in this trial about trying a conspiracy case. Where we have some substantive counts.
>
> But I am too far in this one to back out now. So I'll have to take care of it

some other way if I still think it's been improperly handled." (XII Tr. 2335)

Further, the Court stated:

"Now, in your argument on the conspiracy, Mr. Pitler, I am serious now, I think your generation is going to see a change in law. It is very, very - - I don't like it, where a conspiracy is charged and then twelve other counts in the same indictment. I may have made a mistake in this case by not severing it. I don't feel happy about allowing all this hearsay testimony in and all this stuff, but as I read the law at this point it can be done. I have indicated and I mean to make it clear that the next one of these cases that comes in my division, there will be a severance." (XII Tr. 2350; Emphasis supplied)

As to Petitioner's contention which was briefed and argued that substantial prejudice was inherent in his conviction of a single conspiracy, the basis of evidence disclosing a number of separate and distinct loan transactions that Kotteakos vs. United States, supra, required a reversal as to the conspiracy count, the Court of Appeals below, without any discussion whatsoever, merely found this claimed error to be among those points raised that were found to be without merit. In view of evidence as to the various separate and distinct loan transactions involved, the fact that they occurred on widely separated dates, and the fact that Petitioner was convicted of but a single substantive count involving $65,000, it is incomprehensible as to what evidence the jury relied upon in finding him guilty of a single overall conspiracy allegedly involving some

$700,000. Here, unlike Kotteakos, supra, there wasn't even a common thread or "hub," as not one of the Defendants was charged in all of the substantive counts.

The Opinion below on the basis of the foregoing clearly conflicts with Kotteakos vs. United States, supra.

CONCLUSION

Counsel would respectfully show the Court that the Court of Appeals for the Tenth Circuit has a rule (adopted March 22, 23, 1971) whereby it will not stay the issuance of a mandate except where probable cause is shown that a Petition for Certiorari would not be frivolous, or filed merely for delay, and the Court has issued a stay of mandate in the above case pending filing of this Petition for a Writ of Certiorari.

For the reasons aforesaid, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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Denver, Colorado 80202

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY, 1972, TERM

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	Nos. 71-1168
v.	)	71-1169
DONALD S. COOPER,	)	71-1170
FRANCIS R. SALAZAR,	)	71-1171
PAUL E. COOPER,	)	71-1172
DELMAR E. COOPER, and	)	
GEORGE I. NORMAN, JR.,	)	
Defendants-Appellants.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLORADO
(District Court No. 70-CR-58)

Carl L. Harthun (Robert L. Pitler, on the brief), Denver, Colorado, for Defendant-Appellant Donald S. Cooper; Charles S. Vigil (Francis R. Salazar, pro se, on the brief), Denver, Colorado, for Defendant-Appellant Francis R. Salazar; James W. Creamer (Thomas J. Mitchell, on the brief), Denver, Colorado, for Defendant-Appellant Paul E. Cooper; Harold L. Davison, Aurora, Colorado, for Defendant-Appellant Delmar E. Cooper; Shirley P. Jones, Jr., Salt Lake City, Utah, (James J. Morrato, Denver, Colorado, on the brief), for Defendant-Appellant George I. Norman, Jr.

Milton C. Branch, Assistant United States Attorney (James L. Treece, United States Attorney, on the brief), Denver, Colorado for Plaintiff-Appellee.

Before BREITENSTEIN, HILL and McWILLIAMS, United States Circuit Judges.

HILL, Circuit Judge.

These are direct appeals from convictions of Donald, Delmar and Paul Cooper and Francis Salazar, as principals, and of George Norman, as aider and abettor for alleged misapplication of moneys of a statutorily defined member bank in violation of the 18 U.S.C. §656 and §2.

Twelve counts of the thirteen count indictment returned by the grand jury charged various of the appellants of separate transactions, each constituting a misapplication or embezzlement of funds of the member bank. The first count of that indictment charged all the appellants with conspiracy to defraud the United States in violation of 18 U.S.C. §371 and listed twelve transactions constituting eleven of the substantive counts as overt acts of the conspiracy. Five of the substantive counts were otherwise disposed of by dismissal or severance and were not considered by the jury. Of the remaining counts, guilty verdicts were returned under count one, the conspiracy charge, against Delmar and Donald Cooper and Salazar; against all three of the Coopers and Salazar on count five; and against Delmar and Donald Cooper and George Norman on counts eight and nine.

The Coopers and Salazar were officers and directors of the Rocky Mountain Bank at

Lakewood, Colorado, the "member bank" through which the alleged misapplication was committed. The scheme allegedly used involved the securing of borrowers by the Coopers and Salazar who would apply for loans from the Rocky Mountain Bank. The loan application would be presented to and approved by the Loan and Discount Committee of the bank, the membership of which was partially comprised of various of the Coopers and Salazar. The loan proceeds were then paid the borrower by Donald or Delmar Cooper acting as an officer of the bank. The borrower would endorse the loan proceeds check and return it, usually to either Donald or Delmar Cooper. This money was then used for the private investment purposes of the Coopers and Salazar.

The charge against Norman is substantially similar with the exception that he was never an officer, director, employee or otherwise connected with the Rocky Mountain Bank. It is the government's contention that Norman, like the Coopers and Salazar, secured people who would apply for loans from the Rocky Mountain Bank, and after approval and payment of the loan proceeds would deliver the money to Norman for use by him in his own business ventures. The link connecting Norman as an aider and abettor and co-conspirator is supplied, according to the contention of the government, by the appearance of Donald and Delmar Cooper as officers of one of the business interests of Norman. The government also contends part of the proceeds of the loans made in connection with Norman were used by Donald and Delmar Cooper to acquire an interest in one of the Norman enterprises.

These schemes, according to the government, faltered when certain of the loans were reviewed by federal banking officials. It was apparently thought by appellants that scrutiny could be avoided by removing these loans from their status in the bank as outstanding loans. To accomplish this, the Denver Revival Tabernacle, a Cooper-owned establishment, was transferred to the Rocky Mountain Bank in exchange for certain of the suspect loans. The government contends the value assigned the Tabernacle property in the exchange transaction was grossly over valued, thereby causing a great financial loss on the loans by the exchange transaction.

Each of the appellants questions the sufficiency of evidence to sustain his conviction. A synopsis of the evidence adduced on each count on which convictions were ultimately returned is dispositive. Count five of the indictment charged that the three Coopers and Salazar, as officers and/or directors of the bank, made a $65,000 loan to Harvey Alpert and Michael Cooper which was used for the benefit of the Coopers and Salazar. Alpert testified that he and Michael Cooper obtained the loan together, with a note from Donald and Delmar Cooper guaranteeing repayment. He testified they delivered the loan proceeds to Donald and Delmar Cooper and were told the money was to be used to pay an obligation owed by them at another bank. He testified there were renewal notes made on the loan and that neither he nor Alpert had ever made any payments on the loan. He also testified that at the time of the original loan he knew the loan proceeds were to go to Donald and Delmar Cooper.

A summarization of the transaction was given by an F.B.I. agent on the basis of his analysis of bank records and accounting entries. He testified the $65,000 loan proceeds were disbursed on February 17, 1966, by a Rocky Mountain Bank cashier's check signed by Donald Cooper. After endorsement by Alpert and Michael Cooper, the check was deposited to the trust account of Salazar at another bank on the same day. On February 21, 1966, a check dated February 17, 1966, payable to Denver Revival Tabernacle for $55,000, was charged against Salazar's trust account. This check was endorsed by Delmar Cooper and used together with a $3,775.18 Rocky Mountain Bank cashier's check issued February 17, 1966, payable to Donald Cooper, to purchase a Rocky Mountain Bank cashier's check on February 18, 1966, for $58,775.18 payable to Donald Cooper. The Denver Revival Tabernacle account received $55,938.76 from this cashier's check, and the remainder was returned to Donald Cooper by a $2,836.42 Rocky Mountain Bank cashier's check. Prior to the deposit of $55,938.76, the account ledger for the Tabernacle showed an overdraft of $182.39. On the same day this deposit was made, a $55,754.37 check to American National Bank was charged against the account. This check was a payment in full on a loan of the Tabernacle at that bank.

Repayment of the $65,000 loan to Alpert and Michael Cooper was also included in the F.B.I. agent's summarization. The first payment was a $5,000 Westland Industrial Bank cashier's check drawn on the Rocky Mountain Bank account and was charged to payment of interest on the loan. On March 3, 1967, the

loan balance was paid off by a $56,633 check drawn on Paul Cooper's account at Rocky Mountain Bank payable to that bank. There was also a renewal of $5,000 of the principal on the original loan on March 3, 1967. Payments on the renewal loan were made reducing the balance to $3,000 when it was renewed again. The balance of this renewal on January 30, 1969, when the liquidator for the bank took control of the bank, remained at $3,000. This was subsequently paid in full by Donald Cooper's attorney.

The agent's summarization further disclosed the source of funds for the $56,633 payment by Paul Cooper on March 3, 1967, was a loan made by the Rocky Mountain Bank for that same amount on March 2, 1967. This loan was subsequently renewed and the proceeds used to pay the original loan. Ten payments were made leaving the loan balance on December 24, 1968 at $58,028.06 plus $303.45 interest. The balance of this loan was then included and paid in full in the transfer of the Denver Revival Tabernacle property to the Rocky Mountain Bank.

The conspiracy count alleged twelve overt acts, the same acts charged in eleven of the substantive counts. A detailed narrative is unnecessary other than to say the evidence disclosed transactions similar to that detailed previously; that is, borrowers would be secured and loans made with the loan proceeds being delivered to various of the appellants. Transactions were also alleged in which loans were made to allow purchase of a business enterprise by some of the appellants, then loans were made directly to that business.

Violation of 18 U.S.C. §656 is distinctly limited as to "the class of persons who can violate its provisions, i.e., officers, directors, agents, employees, etc." United States v. Tornabene, 222 F.2d 875, 877 (3d Cir. 1955). The evidence adduced at trial clearly shows that the three Coopers and Salazar were definitely within that class. The offense of "misapplication occurs when an officer of a bank knowingly lends money to a fictitious borrower or causes the loan to be made to his own benefit, concealing his interest from the bank." United States v. Fortunato, 402 F.2d 79, 81 (2d Cir. 1968), cert. denied, 394 U.S. 933. There was ample evidence to support the jury's conclusion that the Coopers and Salazar were receiving the benefits of loans without disclosing this fact. There was also ample evidence to support the conclusion that Donald and Delmar Cooper and Salazar acted in concert in committing the offenses. The convictions returned under counts one and five do not fail for lack of proof.

We now turn to the questioned sufficiency of evidence on the verdicts returned under counts eight and nine charging Donald and Delmar Cooper with misapplication and George Norman with aiding and abetting the misapplication in violation of 18 U.S.C. §2. The two counts charged that two $81,000 loans, one to a Mr. Cloyd Wangsgard and one to Lakewood Medical Center, were made to borrowers secured by Norman and the proceeds used by Norman in his own business enterprises, and also were used by the two Cooper brothers to acquire an interest in one of Norman's businesses. The evidence establishes that the proceeds of the loans were deposited to the Lakewood Medical Center

account at the Rocky Mountain Bank on February 23, 1967. Two checks were written on that account on the same day. The first was a check for $37,100 payable to Greater Leasing Company. The second check was for $124,459.21 payable to Rocky Mountain Bank. Evidence, consisting of an application for assignment and transfer of a radio station license, clearly establishes that Donald and Delmar Cooper were directors of Greater Leasing Company on October 5, 1966, each owning 37.5% of the stock. The evidence further reveals the $37,100 deposit was the source of funds for two checks to pay loans charged in counts 6 and 7 which had been previously obtained by Jensen. A check for $28,179.68 to Rocky Mountain Bank was used to pay off the $28,000 balance of a $35,000 loan. The $35,000 loan was a renewal of a prior $25,000 loan made by Jensen at Norman's request as an accommodation for Salazar. A $7,056.73 check was used to pay off a $7,000 loan obtained by Jensen from Westland Industrial Bank. The proceeds of that loan had been paid to Jensen by a Westland Industrial Bank check signed by Donald Cooper. This check was then deposited by Jensen in his personal account in a Golden, Colorado, bank. At the same time, Jensen made a check payable to Rocky Mountain Bank for $7,000. This check had been used as a payment on the $35,000 loan, reducing that loan to $28,000. The $124,459.21 check, after being shunted through a complicated series of transactions, ultimately went to either Norman or his wife.

The aider and abettor may violate the statute by assisting a bank official in committing

the misapplication.[1] Additionally, it must be shown the misapplication was for the benefit of the bank officer or the aider and abettor.[2] The evidence clearly establishes that the loans made to the borrowers secured by Norman were made in part for the benefit of the Coopers. The fact that Norman was not the named borrower in each of the loans does not serve to insulate him. The evidence discloses the active solicitation and securing of borrowers by Norman and renders the ultimate borrowers to be in reality Norman's alter-ego acting at his direction. Viewing the evidence in the light most favorable to the government, we cannot conclude the jury was unjustified in its guilty verdicts under counts 8 and 9.[3] Appellants raise a multitude of other arguments, many of which are asserted by all. The first argument is that 18 U.S.C. §656 is unconstitutionally vague and uncertain in its use of the term "willfully misapplies" which has no commonly accepted definition. In this context, they assert the statute punishes acts which are not clearly defined as violative of the statute. In United

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1/ "Essential to the crime of aiding and abetting a bank official in violating Section 656 is the guilt of the bank official." United States v. Tornabene, 222 F.2d 875, 878.

2/ See Hall v. United States, 286 F.2d 676 (5th Cir. 1960), cert. denied, 366 U.S. 910).

3/ United States v. Miller, ____F.2d ____ (10th Cir. 1972).

States v. Archambault, 441 F.2d 281 (10th Cir. 1971), cert. denied, ____U.S.____, we dealt with the adequacy of the term "misapply", stating at 283, "'[T]he statutory concept of misapplication is not a vague word of such uncertain application as to require a dismissal of the indictment.'"4/ We do not find the term so vague as to be constitutionally impermissable.

Appellants next assert errors relative to the indictment and the grand jury proceeding. They first claim prejudicial error in the failure to record the grand jury proceedings. We have recently held the failure to record grand jury proceedings is not error.5/

It is next asserted the presence of the Assistant United States Attorney vitiates the aura of the grand jury as an independent body standing between the governmental prosecutory function and the citizenry. In this context it is asserted this is violative of Fifth Amendment protections. We cannot agree. F.R.Crim.P. Rule 6(d) specifically provides for the presence of attorneys for the government at grand jury proceedings. Indeed, the government attorney is essential to the fact presentation process by which the grand jury reaches its ultimate decision. Presentation of evidence for the grand jury's consideration is not in contravention of Fifth Amendment due process guarantees.

4/ United States v. Fortunato, 402 F.2d 79, cert. denied, 394 U.S. 933.

5/ United States v. Hedges, ___F.2d___, (10th Cir. 1972).

In a somewhat similar vein, it is asserted the presentation of matters to the grand jury by the United States Attorney or his assistant is in excess of statutorily authorized powers thereby rendering the indictment fatally defective. We have previously stated the government attorney is essential to the grand jury process and do not find error in the presentation of matters to the grand jury by the United States Attorney.[6/]

It is also asserted the grand jury investigation was improperly conducted in that both the indictment and the superseding indictment were drafted and presented to the grand jury prior to its investigation. Citing Gaither v. United States, 413 F.2d 1061, 1069, (D.C.Cir. 1969), appellant Salazar maintains the "indictment is preceded by a grand jury investigation, at the close of which the grand jury votes to indict. The prosecutor then drafts an indictment." Gaither dealt not with the mechanics of an indictment drawn by the United States Attorney following the grand jury presentment which was signed by the grand jury foreman without submitting it to the remaining members of the grand jury. That decision dealt with the detrimental effect of an indictment which had been redrafted, altered or amended without prior resubmission and approval by the body of the grand jury. We find no error here in the preparation of the indictment before the grand jury's investigation as that body remains free to accept or reject all or any

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6/ See Application of United Electrical, Radio & Mach. Workers of Am., et al, 111 F. Supp. 858 (S.D.N.Y. 1953); United States v. Smyth, 104 F.Supp. 283 (N.D.Cal. 1952).

portion of the indictment it chooses.[7] In the grand jury process, one of the important essentials is the agreement of the requisite members of the grand jury before prosecution can be commenced.

There is next raised an assertion that the superseding indictment under which the convictions were returned is fatally defective and a denial of due process guarantees in that no evidence in addition to that presented in the original indictment proceeding was presented at the superseding indictment proceeding. We held in Edison v. United States, 272 F.2d 684 (10th Cir. 1959), that "[T]he grand jury having heard the witnesses once, it was not essential to the validity of the second indictment that they be recalled and give in the form of repetition the evidence previously given before the same grand jury. It was well within the province of the grand jury to return the second indictment without recalling the witnesses and hearing them anew."[8] The record before us indicates it was the same grand jury that returned both

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7/ "It is common knowledge, to those who are familiar with the practice, that the District Attorney, or someone in his office, in a large percentage of cases, prepares the indictment, based upon information ... which is subsequently submitted to, and if accepted by the grand jury as being supported by the facts, becomes the formal indictment." United States v. Brumfield, 85 F. Supp. 696, 704 (W.D. La. 1949).

8/ See also United States v. James, 290 F.2d 866 (5th Cir. 1961), cert. denied, 368 U.S. 834.

indictments; we therefore find no fatal defect in the superseding indictment.

Next, there are direct attacks by two of the appellants against the language employed in the superseding indictment. Appellant Donald Cooper contends the language of the first count charging misapplication of "funds or credits" is a duplicitous charge which fails to clearly inform him of whether he stands charged with misapplication of funds or misapplication of credits. This count of the indictment charges the single offense of conspiracy and is not duplicitous in its inclusion of two modes of misapplication under the statute.[9/]

It is also asserted the indictment is defective as being generally vague and ambiguous, failing to charge any offense, and being insufficiently informative of the charges to be faced by them. We have repeatedly held the test of sufficiency of the indictment is that "it contains 'the elements of offense intended to be charged and must be sufficient to apprise the accused of the nature of the offense so that he may adequately prepare a defense.'" United States v. Mason, 440 F.2d 1293 (10th Cir. 1971), cert. denied, ___U.S.___. The indictment here meets that test.

Donald Cooper next asserts error in the trial court's refusal of his motion for a bill of particulars. Granting or denying motions for bills of particulars is at the discretion of the court, and denial of such motion will not be disturbed on appeal unless that discretion was abused thereby denying the accused information

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9/ Mulloney v. United States, 79 F.2d 566 (1st Cir. 1935), cert. denied, 296 U.S. 658.

more specifically defining the offense charged against him. United States v. Gleeson, 411 F.2d 1091 (10th Cir. 1969). We find no error in the trial court's denial of the motion.

Appellants next raise arguments relative to various areas of improper and prejudicial joinder. The first improper joinder asserted is that of including the conspiracy charge and the separate substantive offenses together in the indictment. It is a general rule that "a conspiracy count may properly be joined with substantive counts where it is alleged and shown that the offenses are of the same or similar character and are based upon two or more acts or transactions connected together or constituting parts of a common scheme or plan." Miller v. United States, 410 F.2d 1290 (8th Cir. 1969), cert. denied, 396 U.S. 830. Inclusion in the indictment of the conspiracy count and the separate substantive counts was not improper under F.R.Crim.P. Rule 8(a).[10/]

There are next asserted allegations of misjoinder of defendants under F.R.Crim.P. Rule 8(b). In this context it is urged the separate counts of the indictment did not name all the charged defendants, nor was there incorporation of individual counts with the remaining counts. The appellants contend the indictment charges various combinations of individuals with crimes committed in separate transactions without incorporating these separate charges into each other. In United States v. Jorgenson, 451 F.2d 516 (10th Cir. 1971), cert. denied, ___U.S.___,

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10/ See United States v. Scoblick, 225 F.2d 779 (3d Cir. 1955).

we held that joinder was proper where all the co-conspirators were familiar with the modus operandi of the fraudulent scheme even though all the co-conspirators were not present at each charged transaction. 11/ There was sufficient evidence that the appellants were joint participants in the same act or transaction or series of acts or transactions to warrant their joint indictment. Refusal to sever was not reversible error.

It is also asserted the inherent prejudice to all the co-conspirators required severance under F.R. Crim. P. Rule 14. In Jorgenson we held the onus of showing prejudice under Rule 14 is on the movant and the granting or denial of the motion is within the trial court's discretion. We find no abuse of that discretion, therefore we do not conclude there was improper joinder under Rule 14.

Donald Cooper next maintains that in the absence of severance from Salazar, a continuance should have been granted due to a highly publicized search of the building housing Salazar's offices, the arrest of certain individuals, including Salazar's daughter, for narcotics violations, and a suit filed by Salazar in response to the search and arrests, all of which occurred within the week preceding commencement of this trial. The prejudicial publicity argument presents two interesting variations from the usual situation presented in a contention of this sort. First, the subject of the publicity is not lodging the complaint, but rather a

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11/ See United States v. Hickey, 360 F.2d 127 (7th Cir. 1966), cert. denied, 385 U.S. 928.

co-defendant; secondly, the publicity is completely unrelated by way of subject matter to the upcoming trial, and is only an event which the news media felt worthy of some exposure. We held in Dennis v. United States, 302 F.2d 5, 8 (10th Cir. 1962), cert. denied, 384 U.S. 855, that "the mere fact of unfavorable publicity does not of itself raise a presumption of prejudice.... The prejudice must have manifested itself so as to corrupt due process." On this basis we do not find error in the trial court's denial of the motion for continuance.

Donald Cooper next asserts he was deprived of his right to a fair trial through the prohibition imposed by the trial court precluding him from making reference to a prior conviction of the co-defendant Norman. Cooper maintains this prohibition prevented him from testifying effectively as to the reasons for his actions and to further show his intent. We recently dealt with the rule providing for reception of evidence of other crimes in United States v. Burkhart, ___F.2d ___ (10th Cir. 1972). The opinion there dealt extensively with the rule itself, its purpose and the inherent prejudice to one accused against whom such evidence is admitted. Nowhere in that rule do we see a blanket allowance of such evidence if presented by a co-defendant. This type of evidence, once admitted, from whatever source, is equally prejudicial to the accused. The trial judge's admonition here went only to disclosure of Norman's conviction. There was no restriction imposed precluding testimony relating to the transaction. This reflects a judicious limitation imposed by the trial court and we find no error in that limitation.

Appellant Donald Cooper next argues a determination made by the trial court in front of the jury was both prejudicial and an invasion of the jury function. The situation arose when Donald Cooper's attorney objected to a witness' testimony, concerning statements made to the witness by Salazar, as inadmissible hearsay as to Donald Cooper. The trial court overruled the objection stating, "[T]here is evidence tying your client into count 1, the conspiracy. Once the conspiracy has been formed, hearsay is admissible." We held in Dennis v. United States, 346 F.2d 10, 15 (10th Cir. 1965), rev'd on other grounds, 384 U.S. 855, that "incriminating statements made by one co-conspirator during the pendency and in furtherance of a conspiracy are admissable as an exception to the hearsay rule once a conspiracy has been shown." The existence of the conspiracy was sufficiently established by independent evidence[12/] to warrant the allowance of this evidence, and such determination did not invade the jury function. Appellant also maintains the court prejudicially affected the weight of evidence by its characterization that items of evidence would be admitted "against" certain of the defendants. We do not feel the use of the word "against" is improper as emphasizing the evidence confronting the accused.

Error is next asserted relative to the trial court's instructions. Appellants maintain that certain of the instructions were improper and further that the trial court erred in refusing to

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12/ Glover v. United States, 306 F.2d 594 (10th Cir. 1962).

give certain instructions tendered by the defendants. The instructions given, when considered as a whole adequately explained the applicable law. 13/

Error is next predicated by appellants Donald Cooper and Salazar with respect to evidentiary matters. Salazar contends it was error to allow the jury to consider evidence relative to count two when he was not named in that count in the indictment and a mistrial was granted as to the only named defendant. The evidence relative to count two was relevant both to proof of the substantive offense and the conspiracy. The offense charged in count five was also charged as an overt act of the conspiracy. The evidence was properly received against Salazar in context of the conspiracy.

Evidence relative to three counts was received by the court then subsequently rejected and the counts dismissed or severed. The trial court instructed the jury to disregard this evidence in its deliberations. Donald Cooper asserts this evidence, once presented, denied him a fair and impartial trial. His contention is that it was a physical impossibility for the jury to disregard this evidence in its deliberations. It is presumed the jurors observed the instructions of the court and speculation that this was not done may not be employed in assailing their verdict. 14/

13/ Jackson vs. Kansas City, Ks., 448 F. 2d 518 (19 Cir. 1971).

14/ Ellis v. State of Oklahoma, 430 F. 2d 1352 (10th Cir. 1970), cert. denied, 401 U.S. 1010; United States v. Perea, 413 F.2d 65 (10th Cir. 1969), cert. denied, 397 U.S. 945.

Two matters relative to the presentation of evidence to the jury are further raised as reversible error. Appellants first object to the summarization of the extensive bank records, accounting machine tapes, debit and credit slips and loan papers by the F.B.I. agent. They contend this is not a proper case for the use of a summary witness. We have long held that "a qualified expert may examine voluminous or intricate books and records and for the convenience of the court and jury give a summary of their contents ...." Hartford Acc. & Indem. Co. v. Collins-Dietz-Morris Co., 80 F.2d 441 (10th Cir. 1935). The use of the summary witness was proper in aiding the understanding of the evidence presented.

Error is also asserted relative to the delivery to the jury by the trial court of a list of exhibits linking exhibits to specific counts of the indictment. We view this as being in the nature of summary of the evidence by the trial court which is permitted.[15/] We find no error, particularly in view of the record showing complete disclosure by the trial court of its intention to prepare the exhibit list. Following discussion, counsel for appellants approved of this, after being assured they would be permitted to see the list prior to its delivery to the jury.

Other points have been raised by appellants, including a contention the cumulative effect of the trial errors requires reversal. We have considered these other points raised and find them without merit.

Affirmed.

15/ See Davis v. United States, 227 F.2d 568 (10th Cir. 1955).

REVISED PAGES 2 AND 3

These are direct appeals from convictions of Donald, Delmar and Paul Cooper and Francis Salazar, as principals, and of George Norman, as aider and abettor for alleged misapplication of moneys of a statutorily defined insured bank in violation of 18 U.S.C. §656 and §2.

Twelve counts of the thirteen count indictment returned by the grand jury charged various of the appellants of separate transactions, each constituting a misapplication or embezzlement of funds of the insured bank. The first count of that indictment charged all the appellants with conspiracy to commit an offense against the United States in violation of 18 U.S.C. §371 and listed twelve transactions constituting eleven of the substantive counts as overt acts of the conspiracy. Five of the substantive counts were otherwise disposed of by dismissal or severance and were not considered by the jury. Of the remaining counts, guilty verdicts were returned under count one, the conspiracy charge, against Delmar and Donald Cooper and Salazar; against all three of the Coopers and Salazar on count five; and against Delmar and Donald Cooper and George Norman on counts eight and nine.

The Coopers and Salazar were officers and directors of the Rocky Mountain Bank at Lakewood, Colorado, the "insured bank" through which the alleged misapplication was committed. The scheme allegedly used involved the securing of borrowers by the Coopers and Salazar who would apply for loans from the Rocky Mountain Bank. The loan application would be presented to and approved by the Loan and Discount Committee of the bank, the membership of which

was partially comprised of various of the Coopers and Salazar. The loan proceeds were then paid the borrower by Donald or Delmar Cooper acting as an officer of the bank. The borrower would endorse the loan proceeds check and return it, usually to either Donald or Delmar Cooper. This money was then used for the private investment purposes of the Coopers and Salazar.

The charge against Norman is substantially similar with the exception that he was never an officer, director, employee or otherwise connected with the Rocky Mountain Bank. It is the government's contention that Norman, like the Coopers and Salazar, secured people who would apply for loans from the Rocky Mountain Bank, and after approval and payment of the loan proceeds would deliver the money to Norman for use by him in his own business ventures. The link connecting Norman as an aider and

ORDER DENYING PETITION FOR REHEARING

JULY TERM - AUGUST 25, 1972

Before Honorable David T. Lewis, Chief Judge, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett and Honorable William H. Doyle, Circuit Judges

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	) No. 71-1168
DONALD S. COOPER,	) No. 71-1169
FRANCIS R. SALAZAR,	) No. 71-1170
PAUL E. COOPER,	) No. 71-1171
DELMAR E. COOPER,	) No. 71-1172
GEORGE I. NORMAN, JR., Defendants-Appellants.	)

This matter comes on for consideration of motions for leave to file supplements to the petitions for rehearing filed by Donald S. Cooper and by Francis R. Salazar in the captioned cases. Upon consideration whereof,

IT IS ORDERED that the motions for leave to file the supplements are granted.

The Court also has for consideration petitions for rehearing, as supplemented, filed by all of the defendants-appellants in the captioned cases, together with suggestions for rehearing en banc filed by Francis R. Salazar and George I. Norman, Jr., in their individual captioned cases.

Upon consideration whereof, the petitions for rehearing are denied by Order of Circuit Judges Jean S. Breitenstein, Delmas C. Hill and Robert H. McWilliams, the panel who hears oral argument and to whom the cases were submitted.

The petitions for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35, Federal Rules of

Appellate Procedure), the Petitions for Rehearing En Banc are DENIED.

There are also pending motions for stay of mandate pending rehearing and, in event of denial, pending petitions for writs of certiorari to the United States Supreme Court. Upon consideration whereof,

IT IS ORDERED that the mandates in the captioned cases are stayed pursuant to Rule 41(b), Federal Rules of Appellate Procedure, until September 25, 1972 and if during the period of the stay there is filed with the Clerk of this Court a notice from the Clerk of the Supreme Court that the parties who have obtained the stay have filed a timely petition for the writ in that Court, the stay as to such parties shall continue until final disposition by the Supreme Court.

It is the further ORDER of the Court that the defendants-appellants in the captioned cases may remain free on their existing bonds until the appellate process reaches final disposition, or until further Order of this Court.

s/Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

STATUTES

18 U.S.C. Section 656 provides:

Theft, embezzlement, or misapplication by bank officer or employee - Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any

agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution the deposits of which are insured by the Federal Deposit Insurance Corporation. (June 25, 1948, c.645, §1, 62 Stat. 729.)

18 U.S.C. Section 657 provides:

Lending, credit and insurance institutions - Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers'

Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. (June 25, 1948, c. 645, §1, 62 Stat. 729; May 24, 1949, c. 139, §11, 63 Stat. 90; July 28, 1956, c. 773, §1, 70 Stat 714; Aug. 21, 1958, P.L. 85-699, Title VII, §703, 72 Stat. 698; Oct. 4, 1961, P.L.87-353, §3(q), 75 Stat. 774; May 25, 1967, P.L. 90-19, §24(a), 81 Stat.27.)

18 U.S.C. Section 1006 provides:

Federal credit institution entries, reports and transactions - Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban

Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or any small business investment company, with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree, or with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years or both. (June 25, 1948, c. 645, §1, 62 Stat. 750; May 24, 1949, c. 139, §20, 63 Stat. 92; July 28, 1956, c. 773, §2, 70 Stat. 714; Aug.21, 1958, P.L. 85-699, Title VII, §704, 72 Stat.

698; Oct. 4, 1961, P.L. 87-353, §3(s), 75 Stat. 774; May 25, 1967, P.L. 90-19, §24(a), 81 Stat. 27.) (Emphasis supplied)

18 U.S.C. Section 371 provides:

Conspiracy to commit offense or to defraud United States - If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

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CHART I

SUPERSEDING INDICTMENT

CHART OF COUNTS CHARGED - DISMISSED, ETC.

Defendants	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII	XIII
Delmar Cooper	G		NG	NG	G	NG	NG	G	G	S^1	D	S^2	S^2
Donald Cooper	G		NG	NG	G		NG	G	G	S^1	D	S^2	S^2
Paul Cooper	J			NG	G								
Hurt	MT	MT	MT	MT									
Norman	J					NG	NG	G	G			S^2	S^2
Salazar	G		NG	NG	G	NG	J	J	J				

KEY TO ABBREVIATIONS

D = Dismissed
G = Guilty
J = Judgments of Acquittal Granted
Blank Space = Defendant Not Charged
MT = Mistrial
S^1 = Severed Prior to Trial
S^2 = Severed During Trial
NG = Not Guilty

CHART II

CHART OF DATES OF ALLEGED OFFENSES

COUNT I	-	October 7, 1965 - April 15, 1969
COUNT II	-	October 7, 1965
COUNT III	-	October 15, 1965
COUNT IV	-	October 19, 1965
COUNT V	-	February 17, 1966
COUNT VI	-	July 18, 1966
COUNT VII	-	September 22, 1966
COUNT VIII	-	February 24, 1967
COUNT IX	-	February 24, 1967
COUNT X	-	April 12, 1967
COUNT XI	-	April 15, 1967
COUNT XII	-	April 15, 1967
COUNT XIII	-	April 15, 1967

SUPERSEDING INDICTMENT - COUNT I

The Grand Jury charges:

That from on or about the 7th day of October, 1965, and continuously thereafter up to and including the 16th day of April, 1969, within the District of Colorado, DELMAR E. COOPER, DONALD S. COOPER, PAUL E COOPER, ALLEN R. HURT and FRANCIS R. SALAZAR, while being officers and/or directors of The Rocky Mountain Bank, Lakewood, Colorado, a bank whose deposits were then insured by the Federal Deposit Insurance Corporation, and GEORGE I. NORMAN, JR., wilfully and knowingly did combine, confederate and agree together and with each other, and with divers [sic] other persons to the Grand Jurors unknown, to commit an offense against the United States, that is, with intent to injure and defraud said bank, to wilfully misapply or cause to be misapplied approximately $700,000.00 of the moneys, funds or credits of said bank, a more particular description of such moneys, funds and credits being to the grand jurors unknown, in violation of Title 18, United States Code, Section 656.

a. It was part of said conspiracy for the defendants to knowingly and wilfully cause, allow and permit The Rocky Mountain Bank to lend money to individuals, without disclosing to said bank that said loans involved no bona fide transactions of said borrowers but were made for the use and benefit of the defendants.

b. It was a further part of said conspiracy for the defendants to knowingly and wilfully cause, allow and permit The Rocky Mountain Bank to lend money to corporations in which the defendants had an interest, without

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disclosing to said bank the interests of the defendants in said loans and corporations.

OVERT ACTS

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On or about the 7th day of October, 1965, within the District of Colorado, the defendant ALLEN R. HURT issued Cashier's Check #36479, in the sum of $30,000.00, payable to the order of Milton L. Huddleston, drawn on The Rocky Mountain Bank, Lakewood, Colorado.

2. On or about the 15th day of October, 1965, within the District of Colorado, the defendant DELMAR E. COOPER issued Cashier's Check #36495, in the amount of $75,000.00, payable to the order of Central Distributing Company, Inc., drawn on The Rocky Mountain Bank, Lakewood, Colorado.

3. On or about October 19, 1965, within the District of Colorado, the defendant PAUL E. COOPER issued a check in the sum of $35,000.00, payable to Francis R. Salazar, drawn on The Rocky Mountain Bank, Lakewood, Colorado.

4. On or about the 17th day of February, 1966, within the District of Colorado, the defendant DONALD S. COOPER issued Cashier's Check #37825 in the amount of $65,000.00, payable to the order of Harvey Alpert and Michael Cooper, drawn on The Rocky Mountain Bank, Lakewood, Colorado.

5. On or about the 18th day of July, 1966, within the District of Colorado, the defendant DELMAR E. COOPER issued Installment Loan Dept. Cashier's Check #2123, in the amount of $25,000.00, payable to the order of J. Robert Jensen, drawn on The Rocky Mountain Bank, Lakewood, Colorado.

6. On or about the 22nd day of September, 1966, within the District of Colorado, the defendant DELMAR E. COOPER caused to be deposited to the account of Greater Leasing Company, Inc., Account #17-847-4, The Rocky Mountain Bank, Lakewood, Colorado, the sum of $10,000.00.

7. On or about the 24th day of February, 1967, within the District of Colorado, the defendant DELMAR E. COOPER caused to be deposited to the account of Lakewood Medical Center, Inc., Account #21-016-3, The Rocky Mountain Bank, Lakewood, Colorado, the sum of $162,000.00.

8. On or about the 13th day of April, 1967, within the District of Colorado, the defendant DELMAR E. COOPER issued Cashier's Check #41855, in the amount of $33,165.89, payable to the order of J. Robert Jensen, drawn on The Rocky Mountain Bank, Lakewood, Colorado.

9. On or about the 13th day of April, 1967, within the District of Colorado, the defendant DELMAR E. COOPER issued Cashier's Check #41900, in the amount of $25,000.00, payable to the order of Richard C. Head, drawn on The Rocky Mountain Bank, Lakewood, Colorado.

10. On or about the 13th day of April, 1967, within the District of Colorado, the defendant DELMAR E. COOPER issued Cashier's Check

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#41856, in the amount of $25,000.00, payable to the order of Dorothy L. Green, drawn on The Rocky Mountain Bank, Lakewood, Colorado.

All in violation of Title 18, United States Code, Section 371.